LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
FEB 13 1958
JOHN T. FEY, Clerk

No. 727

In the Supreme Court of the United States

OCTOBER TERM, 1957

PRIVATE BRANDS, INC., AND FRANCIS P. CAREY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
RUFUS D. McLEAN,
Acting Assistant Attorney General,
BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	11
Conclusion	19

CITATION

Cases:

Adams v. *McCann*, 317 U. S. 269	11
Cave v. *United States*, 159 F. 2d 464, certiorari denied, 331 U. S. 847	18
Ehrlich v. *United States*, 238 F. 2d 481	14
Felton v. *United States*, 170 F. 2d 153, certiorari denied, 335 U. S. 831	18
Henderson v. *United States*, 218 F. 2d 14, certiorari denied, 349 U. S. 920	17
Holland v. *United States*, 209 F. 2d 516, affirmed, 348 U. S. 121	18
Lawn v. *United States*, No. 9, O. T. 1957, decided Jan. 13, 1958	17
McClanahan v. *United States*, 230 F. 2d 919, certiorari denied, 352 U. S. 824	15
Nye & Nissen v. *United States*, 336 U. S. 613	14
Palmer v. *United States*, 229 F. 2d 861, certiorari denied, 350 U. S. 996	17
United States v. *Klein*, 187 F. 2d 873, certiorari denied, 341 U. S. 952	17
United States v. *McGuire*, 64 F. 2d 485, certiorari denied, 290 U. S. 645	19
United States v. *Mitchell*, 138 F. 2d 831, certiorari denied, 321 U. S. 794	12
United States v. *Socony-Vacuum Company*, 310 U. S. 150	17
Wyche v. *United States*, 193 F. 2d 703, certiorari denied, 342 U. S. 943	17

Rule:

Federal Rules of Criminal Procedure, Rule 30	17

455391—58——1

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 727

PRIVATE BRANDS, INC., AND FRANCIS P. CAREY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 352–358) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1957 (R. 359). The petition for a writ of certiorari was filed on January 16, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner Carey should have been allowed to conduct his own defense and personally examine witnesses, where the corporate defendant of

which Carey was president and controlling stockholder was represented by an attorney, the interests of the individual and corporate defendants were identical, and Carey was permitted to sit at counsel table and formulate the questions to be asked by counsel.

2. Whether the evidence was sufficient.

3. Whether the prosecutor's summation was improper.

4. Whether the trial judge's instructions were sufficient.

STATEMENT

A twenty-one count indictment filed in the United States District Court for the Eastern District of New York charged petitioners with falsely and fraudulently representing to the Armed Forces Medical Procurement Agency that bottles of chloroform supplied to the Agency under contract by petitioner Private Brands, Inc.,[1] of which petitioner Carey was President, conformed to the standards of the United States Pharmacopeia (R. 6–21). Counts 1 through 5 and 11 through 21 relate to false representations contained in bills submitted to the Agency by Private Brands for payment, which stated, in effect, that the bill was correct and just. In counts 6 through 10 petitioners were charged with supplying and seeking payment for chloroform which had previously been rejected by the Agency as below the contract standard, meanwhile concealing the fact of previous rejection. After trial before a jury petitioners were found guilty as charged (R. 332–335). Private Brands was sentenced

[1] Hereinafter referred to as "Private Brands."

to a fine of $100 under each count. Petitioner Carey was fined $100 on each count, the imposition of jail sentence was suspended, and he was placed on probation for one year (R. 37–40, 337). On appeal, the convictions were affirmed.

1. During 1952 and at all times since, Carey has been a very substantial—and at the time of trial, the controlling—stockholder in Private Brands (R. 110–111). The corporation is in the contract packaging business, *i. e.*, it does not manufacture any product and does not usually sell any product under its own name. It packages a variety of products, including but not limited to drugs and chemicals (R. 232).

In December, 1951, Private Brands contracted, after competitive bidding, to supply 25,824 one-pound bottles of chloroform to the Armed Services Medical Procurement Agency (R. 45–47, 50).[2] It was agreed that the chloroform was to conform to the quality standards set forth in the United States Pharmacopeia for chloroform (R. 46, 81).[3] Detailed packing, marking, and shipping instructions were given to petitioners (R. 52–54), and provision made for pre-shipment inspection and testing of the chloroform by the

---

[2] Referred to as the "Agency."

[3] This publication—referred to as "U. S. P."—contains formulas and standards for thousands of chemical compounds used medicinally. No product may bear the title "U. S. P." unless it conforms to the standard set forth. The standards are enforced by the Pure Food and Drug Division of the Department of Health, Education, and Welfare (R. 132–133.)

Agency (R. 56). On February 20, 1952, and March 4, 1952, the Agency exercised its option under the contract to increase the total amount of chloroform to be supplied to about 49,000 bottles (R. 65).

On February 18, 1952, a government inspector obtained five sample bottles of chloroform from Private Brands as representative of those bottled and set aside to be used to fulfill the contract (Lot No. 2049). He sealed them and they were sent to the Agency's laboratory (R. 56–58, 101–105). The laboratory found that the samples did not comply with the essential requirements of the U. S. P. specification as to labeling, description, and specific gravity. Moreover, the samples contained readily carbonizable substances and odorous and chlorinated decomposition products (R. 59, 134–135). These discrepancies were gross deviations from the specification and the samples were rejected (R. 138).

On March 5, 1952, the company was notified that, on the basis of the submitted samples, the chloroform was unfit for the use intended and that its mislabeling could cause confusion in stock records (R. 61). By letter dated March 7, 1952, petitioner Carey, acting for Private Brands, offered to submit new samples (R. 62).

Private Brands then purported to replace the rejected lot (No. 2049) with a new lot (No. 2081). New samples were selected and additional laboratory tests were made. The second laboratory report, dated March 29, 1952, was favorable and petitioners were authorized to make shipments to various medical supply depots throughout the country (R. 67, 107,

138, Govt. Ex. 25). A third lot (No. 2105) also was accepted as conforming to the contract after the testing of samples on May 17, 1952, and its shipment was authorized (R. 108–109, 139).[4]

During April, 1952, Private Brands shipped Lot No. 2081 in 5 separate shipments, some 25,824 bottles of chloroform, to various Army Depots throughout the country. Sometime late in June, 1952, Lot No. 2105 was shipped (11 separate shipments) in the same manner. After each shipment, Private Brands, by petitioner Carey, submitted a bill for payment to the Agency. In each instance Carey certified that the bill was "just and correct" and received payment, a total of some $17,500 (R. 109, 177–178).[5]

On August 19, 1952, the Agency's laboratory received a communication from Fort Totten, New Jersey, stating that particles had been found in the chloroform received from petitioners (Lot No. 2081) (R. 140). Six bottles from the shipment made by Private Brands to Fort Totten through Schenectady General Depot were then obtained for further testing (R. 141). These new tests revealed that there were chemical deviations from U. S. P. standard in the chloroform shipped to Fort Totten by Private Brands, and that these deviations were essentially the same as those found when samples from Lot No. 2049 had been tested. In particular, the specific gravity of the

---

[4] As noted *supra*, p. 4, the number of bottles to be supplied by petitioners was increased in late February and early March. Lot No. 2105 was bottled to fulfill this increased commitment.

[5] These sixteen shipments form the basis for counts 1 through 5 and 11 through 21.

chloroform was consistently higher than that allowed for U. S. P. chloroform. Moreover, inspection of the six bottles indicated that each bottle bore two labels, one superimposed on the other. The exposed label bore Lot No. 2081. The hidden label bore Lot No. 2049 (R. 83, 141–142, 156).

Comparatively large samples of Lots No. 2081 and No. 2105 were then obtained from Schenectady General Depot and additional tests made. Once again, gross deviations from U. S. P. standard were found, and the specific gravity was not within the range for U. S. P. chloroform. However, the bottles in Lot No. 2105 had not been overlabeled (R. 83, 143–145).

After the laboratory found that the sample submitted by Fort Totten did not comply with the U. S. P. standard for chloroform, the Agency suspended issuance of the chloroform by the depots and demanded that Private Brands reimburse the government for the 44,000 bottles of chloroform still on hand (R. 189–191). In a letter dated April 1, 1953, and signed by petitioner Carey, the corporation replied to the charge of non-compliance and demand for reimbursement. At that time it was claimed that after Lot No. 2049 had been rejected (March 3, 1952) the chloroform had been filtered, redistilled, rebottled, and new labels superimposed on the old ones (R. 193–194).

On June 25, 1953, petitioner Carey was interviewed by F. B. I. Agents Johnson and Hogan. They informed him that he need not consent to be interviewed and that anything he might say could be used against him. They then asked Carey about the claim that

the chloroform had been redistilled and filtered. Carey stated that he had personally participated in "reworking" the chloroform and that Robert Ehrlich, production manager, and others had helped him (R. 202–204). Furthermore, he stated that he had personally directed the relabeling, which was done under the supervision of Mr. Ehrlich (R. 204, 213). At a later interview on August 4, 1953, Carey claimed that the "reworking" occurred on two weekends in March and that Ehrlich and one Anthony Carpinelli had helped him (R. 206). These claims were corroborated by Ehrlich and Carpinelli (R. 210). On December 28, 1953, however, Carpinelli withdrew his previous statement. At that time he admitted that he had not participated in "reworking" the chloroform and that he had given his earlier false statement at the request of "someone" from Private Brands (R. 211). At the trial he testified, on behalf of the government, that his first statement to the F. B. I. agents was false and that Robert Ehrlich had directed its making (R. 222–224).

Mr. Robert Ehrlich testified that he was production manager for the corporation; that his statement to the F. B. I. agents that he had participated in reprocessing this chloroform was false; and that he had been directed by petitioner Carey to give a false statement (R. 218–220). Carey had also directed the relabeling, which was done on the regular production line (R. 221).

The Agency laboratory normally procured the chemical supplies which it used in the course of its

work from Schenectady General Depot. In the course of normal procurement it had received 10 bottles of chloroform from Lot No. 2081. In addition, 1 bottle from the sample for Lot No. 2081 submitted by Private Brands was still on hand. These 11 bottles were tested October 22, 1953, one year and seven months after Lot No. 2081 was shipped by petitioners. The ten bottles which had been shipped to Schenectady General Depot did not comply with the U. S. P. standard. The one bottle which had been submitted as part of the sample and not used did comply (R. 145–147).

In August 1954, a large sample of bottles from each of the five shipments of Lot No. 2081 was examined at the various depots to which they had been consigned by petitioners. In each instance, 100% of the sample bore two labels. The exposed labels bore Lot No. 2081. The covered labels bore Lot No. 2049 (R. 179–181).*

In 1952, prior to the time when it was awarded the government contract, the corporation had no chloroform on hand. On February 6, 1952, Private Brands received almost 28,000 pounds of technical chloroform from E. I. DuPont Corporation, paying a price of 16.2 cents per pound (R. 115–116, 118). All except 1,900 pounds was used by February 20, 1952 (R. 116). Next, 3,000 pounds of U. S. P. chloroform were received from McKesson & Robbins on March 19, 1952.

---

*Counts 6–10 alleged that, by referring to the chloroform as part of Lot No. 2081 in its bill for payment, petitioners concealed the fact that the chloroform was part of a lot (No. 2049) which had previously been rejected.

The purchase price was 30 cents per pound (R. 116, 119). Early in May 1952, another 28,000 pounds of technical chloroform were purchased from DuPont at a price of 16 cents per pound (R. 116, 120). This, too, was expended by the end of the month (R. 116).

The DuPont company produces technical chloroform but has not made U. S. P. chloroform since 1951 (R. 81–82). U. S. P. chloroform is stabilized with ethyl alcohol to prevent decomposition, whereas technical chloroform is stabilized with a lesser percentage of amylene. For this reason, the specific gravity of technical chloroform (that is, its weight per volume) is consistently higher than that of U. S. P. chloroform (R. 82–83).[7] Moreover, the impurities which U. S. P. chloroform may contain are limited, whereas technical chloroform may contain any amount or kind of impurities (R. 153–154). For this reason, only U. S. P. chloroform can be used for medicinal and laboratory test purposes (R. 153–154), and the Agency purchases only U. S. P. chloroform (R. 194), even though the price of U. S. P. chloroform is substantially higher than that of technical chloroform (R. 84).

2. The indictment was filed on December 2, 1954, and the case set for trial on January 24, 1955 (R. 1–2). Several short adjournments were taken at the request of petitioners and the case did not come on

[7] Both ethyl alcohol and amylene are light in weight. As compared to U. S. P. chloroform, technical chloroform contains more chloroform and impurities and less stabilizer. Hence a volume of technical chloroform will weigh more than the same volume of U. S. P. chloroform.

for trial until January 31, 1955 (R. 41, 349–351). On that day, for the first time, petitioner Carey requested permission to defend himself personally, while Mr. Driscoll, his attorney, was to continue as counsel for the corporate petitioner. The request was grounded on the assertion that the case involved technical chemical matters and that Mr. Driscoll had been unable to master the technical side of the cas in the time allowed prior to trial (R. 41–42, 277). The district judge ascertained that the interests of petitioners were identical and denied the request, saying (R. 43):

> I am not persuaded that this is necessary, in the light of the competence and ability of your counsel. However, you can sit at the counsel table and if there comes a time when it is necessary to cross examine, that I think you should be permitted to do so, I will let you cross examine.

During the course of trial Mr. Philip R. Hendrixson, a chemist employed by the DuPont corporation, testified for the government to the fact that DuPont made only technical chloroform during the time of the contract. He also explained the differences between U. S. P. chloroform and technical chloroform (R. 80–85). When the time came for cross-examination, defense counsel stated that petitioner Carey would like to cross-examine. The court denied the request (R. 85) stating:

> No. He can give you whatever questions he wants you to put and you can put the questions.

During the presentation of the evidence for the defense, out of the presence of the jury, defense counsel stated that petitioner individually wished to examine a witness he proposed to call (R. 276–277). The court again pointed out that the attorney had appeared for both defendants at all times before trial, that the court had consistently permitted petitioner to suggest the questions he wished put to the witness, although this practice had protracted the trial. The court said it would still permit counsel "to consult with the individual defendant and have him suggest to you any questions that you feel he wants to have put to the witness". (R. 278).

ARGUMENT

1. Petitioner Carey requested permission to defend himself on the very day of trial, some seven weeks after indictment, and after permitting his counsel to handle the preliminary motions. The trial court denied the request but granted petitioner Carey permission to share the counsel table and agreed to consider the question of cross-examination when it arose. Such action was clearly within the permissible discretion of the trial judge. The interests of the corporate and individual petitioners were identical, and it was manifestly desirable that the attorney, rather than the individual, have the primary responsibility for the conduct of the case. While an accused may waive his constitutional right to counsel (*Adams* v. *McCann*, 317 U. S. 269, 279) the trial judge did not err in refusing to permit defendant to embark on "* * * the well-nigh suicidal course

of attempting to go on with the case alone" unless there was reason to believe that petitioner could have presented his defense better had he acted in person rather than through his counsel. *United States* v. *Mitchell,* 138 F. 2d 831, 832 (C. A. 2), certiorari denied, 321 U. S. 794. There is no support in the record for such an inference, and, of course, the evaluation of the ability of the individual petitioner to ask questions personally rather than through counsel is one which the trial judge, having the parties before him, is in the best position to make. It may well be that the court was of the view that the procedure requested would not only delay the trial but might prejudice the petitioner in the eyes of the jury.

While petitioner was not allowed to cross-examine the witness personally, he was granted the equivalent thereof. He was allowed to formulate the questions which he wished to be put by his attorney. The record shows that counsel cross-examined expert witnesses at some length, attempting to induce them to concede that chloroform might meet the specifications for U. S. P. chloroform even though its specific gravity was slightly higher than the range provided by the U. S. P. specification (R. 87–89, 159–161). Where counsel got into difficulty was when he tried to put questions, which he said were suggested by petitioner, relating not to chloroform but to formaldehydes, which were not involved in the case (R. 90–91).

Of ten defense witnesses, only one, Mr. William Bechtoldt, testified concerning chemical matters (R. 311–313, 316–320). Through him an attempt was made to show the results of chemical tests by Bech-

toldt, an independent chemist, on a bottle of chloroform submitted to him by petitioners (R. 311–312). However, the defense completely failed to show that the bottle of chloroform was similar to that supplied to the government under the contract (R. 315). Beyond that, after consultation with petitioner (R. 316) an attempt was made to put a hypothetical question which was excluded as based on an incorrect characterization of the evidence (R. 316–318), and there was an unsuccessful attempt to show that chloroform might have a higher specific gravity than the range provided by U. S. P. standards and yet be accepted as U. S. P. chloroform (R. 319–320).

The government proceeded on the theory that petitioners had contracted to supply U. S. P. chloroform but, instead, had wilfully and fraudulently supplied technical chloroform—a less expensive substitute which was unsuitable for medical and laboratory purposes. The theory of the defense was that the chloroform had deteriorated while in storage after delivery due to the type of closure used on the bottles of chloroform, without fault or fraud on the part of petitioners. Defense counsel had seven weeks to prepare for trial and the chemistry problems in this case were not so difficult that they could not have been mastered in much less time. Petitioners are not able to point to a single area where petitioner Carey, had he been permitted to conduct his own defense, would have been able to present evidence which was more favorable or more extensive than that adduced by his counsel.

Insofar as the record discloses petitioner's personal participation in the cross-examination of witnesses, it bears out the wisdom of the trial court's ruling that petitioner should be represented by the counsel he had chosen.

2. The facts summarized in the Statement show that there was ample evidence to support the verdict. The jurors were justified in concluding that petitioner had knowingly passed off cheaper DuPont technical chloroform for the more expensive U. S. P. chloroform called for in the contract. See *Nye & Nissen* v. *United States*, 336 U. S. 613; *Ehrlich* v. *United States*, 238 F. 2d 481 (C. A. 5); and *McClanahan* v. *United States*, 230 F. 2d 919 (C. A. 5), certiorari denied, 352 U. S. 824.

Petitioners' principal contention on this issue is that the government failed to establish that the chloroform was defective at the time of delivery (Pet. 20–22). In particular, they rely on the fact that the samples from Lot No. 2081 and 2105 were accepted as conforming to U. S. P. standards. It is true that these samples were selected by a government inspector and sealed by him and that there is no direct evidence that petitioners tampered with the samples. However, it was shown that after Lot No. 2049 was rejected petitioners purchased a relatively small amount of U. S. P. chloroform; that when the inspector selected the samples from Lot No. 2081 the over 1,000 cases of bottles comprising the lot were stacked five to eight high and in rows (R. 101, 292); and that, after sealing the samples, the government

inspector left them with petitioner to be mailed (R. 106).

The fact is that the chloroform actually shipped did not meet U. S. P. standards. Indeed, petitioners never had in their possession sufficient U. S. P. chloroform to fulfill the contract; they had only technical chloroform. This, coupled with evidence that Lot No. 2081 was really rejected Lot No. 2049 and that Carey induced two of his employees to lie to the F. B. I. agents regarding the "reworking" of the chloroform, justified the jury's conclusion that petitioners wilfully and frauduently supplied technical chloroform instead of U. S. P. chloroform to the government.

Petitioners contend that perhaps the chloroform which was shipped became contaminated after delivery because of the manner in which it was stored or because of the interaction between the bottle contents and the cap used to seal each bottle. The facts in the record negate this defense. First, the contract required petitioners to use an inner seal which was impervious to the contents of the bottle (R. 317). Second, petitioners presented no evidence to show that the cap was of such a nature as to cause the decomposition of chloroform. Third, one bottle of the sample submitted for Lot No. 2081, which met the standard for U. S. P. chloroform, had not decomposed when tested 1 year and seven months after Lot No. 2081 had been shipped by petitioners. Fourth, and most important, petitioners' theory does not account for the fact that the specific gravity of

the chloroform shipped was consistently higher than the specific gravity of U. S. P. chloroform.*

3. Petitioners contend that the prosecuting attorney improperly asserted, during the closing argument, that he personally knew that the five bottles submitted as a sample of Lot. No. 2081 were filled with U. S. P. chloroform obtained by petitioners from McKesson & Robbins Company. However, the very paragraph of argument relied upon by petitioners shows that they misconstrue the prosecutor's remarks (Pet. 24–25).

The prosecutor said in summation,

> Now, I don't know how Mr. Carey got to the Agency the five new samples which bore Lot No. 2081, but I do know where it came from. I know that it was U. S. P. chloroform and I know that it came from McKesson & Robbins.

In the very next breath the prosecutor gave the source of his knowledge, saying,

> If you will look at the exhibits in this case you will find that on March 19, 1952, exactly five days before the second group of samples were sent in to the laboratory, Mr. Carey obtained 3,000 pounds of U. S. P. chloroform from McKesson & Robbins. That is the source of the

---

* Petitioners point to the fact that the Armed Forces Board of Contract Appeals denied the government's request for a recovery of some of the money paid under this contract in a civil administrative proceeding. Of course, such a determination, based on whatever evidence was before the Board, is not determinative of the sufficiency of the evidence presented at this trial.

chloroform which he submitted as the second group of samples. [Summations 34][9]

Since the prosecutor did not suggest that he had personal knowledge outside the record as to the source of the sample, the argument was proper. *Lawn* v. *United States,* No. 9, O. T. 1957, decided Jan. 13, 1958, slip opinion p. 19–20, fn. 15; *Henderson* v. *United States,* 218 F. 2d 14, 19 (C. A. 6), certiorari denied, 349 U. S. 920; *United States* v. *Klein,* 187 F. 2d 873, 876–877 (C. A. 7), certiorari denied, 341 U. S. 952. No objection was made to the remarks and, even if it be conceded *arguendo* that the use of the first person in the single passage quoted above was unfortunate, it would hardly justify a new trial. See *United States* v. *Socony-Vacuum Company,* 310 U. S. 150, 240–242.

4. Petitioners contend that the trial judge summarized the evidence in his charge so as to unduly emphasize the prosecution's case, failed to explain or define "knowingly", "wilfully" and other essential elements of the offense, and did not tell the jury that a defendant is presumed to be innocent until proven guilty (Pet. 27–30).

Petitioners made no objection to the instructions given (R. 332). That fact alone, in relation to the evidence in this case, forecloses the present argument. Rule 30, F. R. Crim. P.; *Palmer* v. *United States,* 229 F. 2d 861 (C. A. 10), certiorari denied, 350 U. S. 996; *Wyche* v. *United States,* 193 F. 2d 703, 705 (C. A.

[9] The summations of counsel are not printed in the record as filed by petitioners but appear in a separate transcript, filed herewith, which has been certified to be a part of the original record before the Court of Appeals.

D. C.), certiorari denied, 342 U. S. 943; *Felton* v. *United States*. 170 F. 2d 153, 154 (C. A. D. C.), certiorari denied, 335 U. S. 831; *Cave* v. *United States*, 159 F. 2d 464, 469 (C. A. 8), certiorari denied, 331 U. S. 847. As noted by the Court of Appeals below, none of the claimed errors was so serious as to affect substantial rights (R. 358).

As to the elements of the offense, the court's instructions were adequate. The judge read the statute allegedly violated by the petitioners (R. 323) and then reviewed the allegations in representative counts (R. 325–328). If it is enough to tell the jury the substance of each count when defendant is charged with filing a false and fraudulent income tax return (*Holland* v. *United States*, 209 F. 2d 516, 522 (C. A. 10), affirmed, 348 U. S. 121), then surely it is enough to read both the indictment and the statute when petitioners are charged with submitting a bill containing a false and fraudulent entry.

After explaining the offense, the court undertook merely to explain "generally speaking" what the evidence in the case disclosed (R. 329). The only evidence he discussed in any detail was that of Mr. Hendrixson of the DuPont Company as to the difference between U. S. P. and technical chloroform, noting that DuPont had been the source of supply (R. 329–331). Early in his charge the judge had told the jury that they were the sole judges of the facts and that "neither what counsel may have said in their summations in respect to their understanding of the facts, nor indeed what I may say in my charge

concerning what the evidence is, need conclude you" (R. 324).

Although no instruction on the presumption of innocence was given, it was not requested, and a full instruction on reasonable doubt was given (R. 324). Under these circumstances the absence of an instruction on this presumption is not reversible error. *United States* v. *McGuire*, 64 F. 2d 485, 493 (C. A. 2), certiorari denied, 290 U. S. 645.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
RUFUS D. MCLEAN,
Acting Assistant Attorney General.
BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys.

FEBRUARY 1958.

U. S. GOVERNMENT PRINTING OFFICE: 1958